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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1309

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

BRIEF FOR *AMICI CURIAE* PUBLIC CITIZEN AND CENTER FOR WOMEN POLICY STUDIES

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BRIEF FOR *AMICI CURIAE* PUBLIC CITIZEN AND CENTER FOR WOMEN POLICY STUDIES

INTERESTS OF THE *AMICI CURIAE*

Amici Public Citizen and the Center for Women Policy Studies are representing the interests of those persons seeking to preserve their First Amendment right to receive advertisements containing information about abortions, so that they may effectively and intelligently exercise this constitutionally protected right to terminate an unwanted pregnancy.[1]

[1] It is beyond dispute that the First Amendment protects the interests of the reader and listener just as energetically as the interests of the publisher and speaker. *E.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

Public Citizen is a non-profit organization supported entirely by public donations. In the slightly more than three years since it began soliciting public support, Public Citizen has received donations from more than 100,000 persons. It engages in a wide variety of activities on behalf of consumers, and it is particularly concerned about laws which prohibit certain advertising, thereby interfering with consumers' access to vital information. Thus, Public Citizen has assisted several state consumer organizations prepare surveys demonstrating the pernicious effect which laws prohibiting the advertising of prescription drug prices have on drug prices. Attorneys for Public Citizen represented the Virginia Citizens Consumer Council and the Virginia State AFL-CIO in a successful challenge to the Virginia law which prohibited the advertising of information about prescription drug prices.[2]

Additionally, one of Public Citizen's component organizations, the Health Research Group, has published a directory containing factual information about physicians in Prince George's County, Maryland.[3] Because Maryland law prohibits advertising by physicians, a substantial number of Prince George's County doctors refused to supply information for publication in the directory. Attorneys for Public Citizen are representing several consumer organizations in a First Amendment challenge to the Maryland

[2] *Virginia Citizens Consumer Council v. State Board of Pharmacy*, 373 F.Supp. 683 (E.D. Va. 1974) (three-judge court).

[3] The information in the directory includes the physician's educational background, his availability on weekends and vacations, fees for some standardized laboratory tests, whether he accepts Medicare patients, the languages he speaks, and other information which is not readily available to a person in need of a doctor.

law as it impedes the effective preparation of the doctor's directory.[4]

The Center for Women Policy Studies is a non-profit organization which has received financial support from the Ford Foundation, the United Methodist Women, the Edna McConnell Clark Foundation, the Law Enforcement Assistance Administration and other organizations. It engages in research and projects relating to the status of women in society. The Center seeks to insure that a woman who decides to have an abortion has access to relevant information which will assist her in effectuating that decision in a manner consistent with her health and welfare.

The interests presented by the *amici* in this case are the interests of consumers in having access to the full spectrum of available information. While the informational interests of consumers might be similar to the commerical interests of advertisers, they are not necessarily identical.[5] Moreover, as one commentator expressed it, "[s]ince advertising performs a significant function for its recipients, its values are better viewed with the consumer, rather than the seller, as the frame of reference." Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429, 434 (1971).

[4] *Public Citizen, et al. v. Commission on Medical Discipline of Maryland, et al.*, Civil Action No. 74-56B, D. Md. A copy of the complaint is attached as Appendix A to this brief.

[5] *Compare Patterson Drug Co. v. Kingery*, 305 F.Supp. 821 (W.D. Va. 1969) (three-judge court), *with Virginia Citizens Consumer Council v. State Board of Pharmacy*, 373 F.Supp. 683 (E.D. Va. 1974) (three-judge court).

Finally, we believe it is important for this Court to consider the interests of recipients of information because "[i]t would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan J., concurring opinion).

SUMMARY OF ARGUMENT

Appellant Jeffrey C. Bigelow was convicted of violating section 18.1-63 of the Virginia Code because he published an advertisement which provided information about abortions. It is the position of the *amici* that section 18.1-63 of the Code of Virginia violates the First Amendment because (1) it inhibits the dissemination of information regarding the constitutionally protected right to have an abortion; and (2) Virginia could accomplish its legitimate objectives in protecting the health, safety and welfare of its women with laws which do not as seriously infringe on First Amendment rights.

In upholding the conviction and ruling that section 18.1-63 did not violate the First Amendment, the Supreme Court of Virginia relied primarily on *Valentine v. Chrestensen*, 316 U.S. 52 (1942), and *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1972).[6] We submit that *Hunter* is inapplicable since it involved a law prohibiting advertisements which aided and abetted illegal conduct — *viz.*, racial discrimination in housing — and that the decision in *Valentine* that commercial speech is not protected by the First Amendment has been substantially eroded by subsequent decisions of this Court.

[6] App. 4a-5a. The opinion of the Supreme Court of Virginia was reproduced in the appendix to Appellant's Jurisdictional Statement. References herein to that opinion will be to that appendix.

Whatever the current validity of *Valentine*, it does not, we suggest, support a law which interferes with the dissemination of vital information about a constitutionally protected right merely because that information appears in an advertisement. Moreover, there are positive reasons why advertising — even of a commercial nature — warrants the same First Amendment protection as other forms of speech, especially when the advertisement conveys important information as it did here.

ARGUMENT

I. PROHIBITING THE PUBLICATION OF ADVERTISEMENTS CONTAINING INFORMATION WHICH ASSISTS THE RECIPIENT IN THE EXERCISE OF CONSTITUTIONALLY PROTECTED RIGHTS VIOLATES THE FIRST AMENDMENT.

A. The First Amendment Does Not Exclude Advertising From Its Protection

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), this Court outlined those

> . . . narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

Id. at 571-572 (footnotes omitted). Since advertising falls within none of these categories, it is presumptively entitled

to be protected by the First Amendment.[7] Obscene advertisements may be constitutionally punished, *see Hamling v. United States*, ___ U.S. ___, 94 S.Ct. 2887 (1974), as may ads which are false or misleading, *see Lynch v. Blount*, 330 F.Supp. 689 (S.D.N.Y. 1971) (three-judge court), *aff'd*, 404 U.S. 1007 (1972). But advertisements *per se* are not beyond the pale of the First Amendment. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The Supreme Court of Virginia relied heavily on *Valentine v. Chrestensen*, 316 U.S. 52 (1942), in support of its conclusion that section 18.1-63 is not unconstitutional. In *Valentine* the sponsor of a trip on a submarine was charged with violating an anti-litter provision of the sanitation code of New York City prohibiting the distribution in the streets of commercial and business advertising leaflets. The Court held that a prohibition against the dissemination in the City's streets of a leaflet touting the trip was not unconstitutional. As Mr. Justice Douglas has observed, the *Valentine* "ruling was casual, almost off hand. And it has not survived reflection." *Cammarano v. United States*, 358 U.S. 498, 514 (1959) (concurring opinion). Just last term, Mr. Justice Brennan declared that "[t]here is some doubt concerning whether the 'commercial speech' distinction announced in *Valentine v. Chrestensen*, 316 U.S. 52

[7] Several lower courts have held that advertising is protected by the First Amendment. *E.g., Hiett v. United States*, 415 F.2d 664 (5th Cir. 1969), *cert. denied*, 397 U.S. 936 (1970) (advertisements designed to solicit Mexican divorce business); *Associated Students For the University Of California At Riverside v. Attorney General*, 368 F. Supp. 11 (C.D. Calif., 1973) (three-judge court; abortion advertisements); *Atlanta Cooperative News Project v. United States Postal Service*, 350 F.Supp 234 (N.D. Ga. 1972) (three-judge court; abortion advertisements in a newspaper).

(1942), retains continuing validity." *Lehman v. City of Shaker Heights*, ___ U.S. ___, 94 S. Ct. 2714, 2723, n. 6 (1974) (dissenting opinion).

Not only has the validity of the *Valentine* ruling been directly questioned, but it has been tacitly undermined and considerably narrowed by subsequent decisions of this Court. For example, in *Talley v. California*, 362 U.S. 60 (1960), this Court held unconstitutional an ordinance which prohibited the distribution of handbills unless they had printed on them the names and addresses of the persons who prepared them. The handbills involved urged a commercial boycott of merchants who discriminated against minorities. The dissenting justices believed the law was constitutional for several reasons including their view that "commercial handbills may be declared verboten. Valentine v Chrestensen. . . ." *Id.* at 71. The majority justices, however, never mentioned *Valentine* and declared that only handbills which are obscene, libelous, or which present false or fraudulent advertising are not protected by the First Amendment. *Id.* at 64.

In two other recent cases, the Court has upheld restrictions on advertising without ever mentioning *Valentine*. In *Rowan v. United States Post Office*, 397 U.S. 728 (1970), the Court upheld the constitutionality of a law allowing addressees to have their names deleted from the mailing lists of those sending obscene advertisements. And in *Lehman v. City of Shaker Heights, supra*, this Court sustained the constitutionality of a municipal ordinance which prohibited paid political advertising on the public transit system. Both of those opinions contained lengthy discussions about the First Amendment issues, discussions which we submit would have been unnecessary if advertising is simply not a form of speech entitled to constitutional protection.

This Court's recent decision in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), has also narrowed *Valentine* and strongly suggests that not all commerical advertisements are undeserving of First Amendment protection. Mr. Justice Powell, writing for the five majority justices, recognized that there might be instances in which the exchange of information in the commercial realm would be of sufficient value to bring it within the First Amendment, but concluded that "[a]ny First Amendment interest which might be served by advertising an ordinary commercial proposal . . . is altogether absent when the commercial activity itself is illegal. . . ." *Id.* at 389.[8] This holding that advertisements which aid or abet *illegal* activity may be prohibited is consistent with the First Amendment and with a bar against fraudulent advertising. Since it is not illegal for a woman to have an abortion, at least during the first trimester of pregnancy, *Roe v. Wade*, 410 U.S. 113 (1973), the decision in *Pittsburgh Press* does not support the constitutionality of section 18.1-63, and its reasoning suggests the contrary conclusion.[9]

[8] It was also the illegal nature of the activity being advertised — *viz.*, racial discrimination in the sale or rental of housing — which resulted in the decision in *United States v. Hunter*, 459 F.2d 205 (4th Cir. 1972), another case principally relied upon by the Supreme Court of Virginia in the decision below.

[9] Even at the time of Mr. Bigelow's conviction, his advertisement was not aiding and abetting illegal activity because it was lawful for a Virginia woman to have an abortion in New York, which is where the advertised operation was to be performed. Moreover, today his ad would not violate section 18.1-63 for that section as amended in 1972 prohibits only those ads which encourage an abortion "in this State" which is prohibited by law.

B. Advertising Should Be Accorded The Same Status Within The First Amendment As Other Forms Of Speech

As we have demonstrated, *Valentine v. Chrestensen* has been substantially eroded and rightly so, we submit, because not only is there no reason why advertising should not be accorded the same status within the First Amendment as other forms of speech, but there are also positive reasons why it should be accorded such status.[10] In rejecting the argument that advertising is devoid of literary, artistic or other social value, and therefore less deserving of First Amendment protection, the Court of Appeals for the Ninth Circuit has recognized that "[a]dvertising performs an important First Amendment function in aid of communication." *United States v. Pellegrino*, 467 F.2d 41, 45 (9th Cir. 1972). Moreover, "advertising serves a legitimate educational function in that it is 'an immensely powerful instrument for the elimination of ignorance — comparable in force to the use of the book instead of oral discourse to communicate knowledge.' " Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo. Wash. L. Rev. 429, 433 (1971) (footnote omitted).

Advertising is an invaluable source of information for consumers.[11] For example, it informs persons about the wide discrepancy in prescription drug prices thus permitting

[10] *See Developments In The Law — Deceptive Advertising*, 80 Harv. L. Rev. 1005, 1027 (1967).

[11] For many people, advertised information will be of far more value than viewing "Carnal Knowledge," *see Jenkins v. Georgia*, ___ U.S. ___, 94 S.Ct. 2750 (1974), or reading *The Pentagon Papers*, *see New York Times Co. v. United States*, 403 U.S. 713 (1971), or stories of bloodshed and lust, *see Winters v. New York*, 333 U.S. 507 (1948).

them to maximize what may be a very limited income. *See Virginia Citizens Consumer Council v. State Board of Pharmacy*, 373 F.Supp. 683, 684-85 (E.D. Va. 1974) (three-judge court). Additionally, advertising may have the laudatory effect of lowering prices. For example, the Chairman of the Federal Trade Commission recently noted that "eyeglasses were 25% to 100% more expensive in states where sellers were not permitted to advertise." Address by Lewis A. Engman, Annual Meeting of the Antitrust Law Section of the American Bar Association, August 14, 1974. However, laws prohibiting advertising have been used to interfere with the efforts of a non-profit organization to publish for the benefit of persons in need of medical services factual information about physicians, such as whether he is available on weekends and vacations, what languages he speaks, whether he accepts Medicare patients, how long it takes to obtain a non-emergency appointment, and whether he makes house calls. (See Appendix A to this brief.)

Not only should advertising be constitutionally protected because of its value to society in general, but since the right of a woman to have an abortion is a constitutionally protected right, advertising which will assist a woman in exercising that right is particularly deserving of First Amendment protection. The advertisement involved in this case provided essential factual information to a Virginia woman who wished to have an abortion but could not legally obtain one in Virginia. Since some hospitals and many doctors still refuse to perform abortions, *see e.g., Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973), a woman in a town whose only hospital refuses to perform abortions, will be informed of their availability in New York. Additionally, if a woman who desires to have an abortion has not been a resident of Virginia for 120 days, she is unable

to have a legal abortion in Virginia and may wish to go to New York.[12] Or a pregnant woman may feel it necessary to go out-of-state for an abortion because of the prevailing anti-abortion sentiment where she lives. For whatever reasons, a woman who cannot or does not want to have an abortion in Virginia will learn from this advertisement that she may obtain an immediate abortion in New York, that the abortion will be performed in an accredited hospital or clinic, that her inquiry will remain confidential and that she will receive counseling. We submit that all of this information will be of obvious and considerable value to a woman who has decided to have an abortion, and that instead of prohibiting the dissemination of such information, it should be encouraged. The dissemination of information and opinion is the very function the First Amendment performs in our society, and there is, we submit, no reason to exclude its protection in this instance.

II. LAWS LESS RESTRICTIVE THAN SECTION 18.1-63 WOULD ACCOMPLISH VIRGINIA'S LEGITIMATE OBJECTIVES IN PROTECTING THE HEALTH, SAFETY AND WELFARE OF ITS WOMEN.

The Supreme Court of Virginia viewed the anti-advertising prohibition of section 18.1-63 as a "reasonable" measure designed (1) to advance Virginia's interest in not encouraging women to have abortions, and (2) to protect the health, safety and welfare of pregnant Virginia women. (App. 7a). We submit that the state does not have a constitutionally protected interest in not encouraging abortions and that it could accomplish its legitimate,

[12] Section 18.1-62.1 of the Code of Virginia (1974 Supplement) imposes numerous other restrictions on the performing of abortions.

health-related goals with laws which do not as seriously infringe on First Amendment rights.

Even assuming that the advertisement in this case is designed to encourage women to have abortions, that is not a justifiable reason for the state to prohibit it. Surely, a law which prohibited editorials or speeches encouraging abortions as a method of population control would be unconstitutional. The First Amendment's "basic guarantee is of freedom to advocate ideas[,]" and the state may not interfere with such advocacy because the ideas might be "contrary to the moral standards, the religious precepts, and the legal code of its citizenry." *Kingsley International Pictures Corp. v. Regents of Univ. of New York, 360 U.S.* 684, 688 (1959). And the fact that the message appears in an advertisement does not remove its First Amendment protection. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964).

Turning to Virginia's objective of promoting the health, safety and welfare of its pregnant women, it is not sufficient, as the Virginia Supreme Court thought, that section 18.1-63 might be a "reasonable" means of accomplishing it. Laws which infringe on fundamental rights must be narrowly drafted. *E.g., Roe v. Wade,* 410 U.S. 113 (1973); *Dunn v. Blumstein,* 405 U.S. 330 (1972); *Shapiro v. Thompson,* 394 U.S. 618 (1969); and *Talley v. California,* 362 U.S. 60 (1960). This Court has emphasized that "the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society." *Broadrick v. Oklahoma,* 413 U.S. 601, 611-612 (1973) (citations omitted). In another case specifically involving

First Amendment rights, this Court held that "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960) (footnote omitted). And in *Pittsburgh Press, supra,* the ordinance was upheld only as "narrowly drawn." 413 U.S. at 391.

We share the desire of the Commonwealth of Virginia to protect the health, safety and welfare of its pregnant women.[13] We submit, however, that Virginia has not demonstrated — because it cannot — that the prohibition of all advertising protects the health of a pregnant woman.[14] We also vigorously support the state's interest in prohibiting false or misleading advertising about abortions, but a law which permits advertising about abortions does not require that fraud, overreaching and misrepresentation be

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[13] Virginia already has laws which protect the health and safety of Virginia women seeking an abortion, and which do not infringe on any First Amendment rights. For example, section 18.1-62.1(b) of the Code of Virginia (1974 Supplement) requires that abortions be performed in hospitals which are accredited and licensed by the state health department. Although requiring that abortions be performed in approved hospitals or clinics would appear to be an adequate means of protecting the health and safety of a woman who has an abortion, Virginia might also consider a law requiring advertisements to indicate that the abortions will be performed in hospitals and clinics which comply with state law, as Mr. Bigelow's advertisement so indicated.

[14] The Supreme Court of Virginia apparently believes that proper medical care cannot be provided by those interested in financial gain, (App. 7a, 9a) a belief which is not supported by any evidence in the record, and which is inconsistent with Virginia's licensing of private profit-making hospitals and the practices of nearly all physicians.

tolerated. *See Note, Advertising, Solicitation and the Professional Duty to Make Legal Counsel Available*, 81 Yale L.J. 1181, 1188 (1972). Deceit and misrepresentation should be handled with laws narrowly drafted to punish that activity, not with blanket restraints on expression.[15] *See, e.g., Talley v. California*, 362 U.S. 60, 63 (1960).

Additionally, if Virginia could demonstrate that a doctor's "puffing" his superior ability to perform abortions would interfere with the health and safety of pregnant Virginia women, then it could draft a law narrowly directed to prohibit advertisements which proclaim professional superiority. *Cf., Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608 (1935). For example, Virginia has a law which prohibits a pharmacist from making statements "about his professional service which have a tendency to deceive or defraud the public, contrary to the public health and welfare." Code of Virginia § 54-524.35(2) (1974 Supplement).

Not only are *amici* opposed to false and misleading advertising, but we would also not want to see blinking neon signs along the nation's highways declaring the availability of abortions in the nearest town. A determination that advertising is protected by the First Amendment, however, does not mean that advertising could not be regulated. The principle that all speech can be regulated in some respects has not been seriously disputed since Mr. Justice Holmes asserted that the First Amendment does not protect a person from falsely shouting fire in a crowded theater. *Schenck v. United States*, 249 U.S. 47 (1919). Recognizing that speech can be regulated, this Court recently upheld the constitutionality of an ordinance which excluded political

[15] Virginia has a statute which prohibits "untrue, deceptive or misleading" advertisements. Code of Virginia § 59.1-44 (1973 Replacement Volume).

advertising from the public transit system as a legitimate measure to protect users thereof from "the blare of political propaganda." *Lehman v. City of Shaker Heights, supra*, 94 S.Ct. at 2718.[16] Section 18.1-63 does not, however, seek to regulate the "time, place and manner" of advertisements relating to abortions, but attempts to control the content of those advertisements by prohibiting language which is designed to encourage abortions. As we have noted, prohibiting speech because it advocates unpopular ideas is contrary to the very essence of the First Amendment.

Thus, the Commonwealth of Virginia can accomplish its legitimate interest in protecting the health, safety and welfare of its women with laws which prohibit false and misleading advertising or perhaps even "puffing," but section 18.1-63 is broader than necessary to accomplish this objective and consequently it violates the First Amendment.

[16] Mr. Justice Brennan writing for the four dissenting justices in *Lehman* noted that this Court has "repeatedly recognized the constitutionality of reasonable 'time, place and manner' regulations which are applied in an evenhanded fashion." *Id.* at 2721 (citations omitted). The dissenting justices disagreed with the majority on the issue of whether the law was being applied in an "evenhanded fashion."

CONCLUSION

We respectfully submit that not only is there no legitimate reason for excluding advertising from the First Amendment, but that there are also positive reasons for including it, especially when the advertising conveys information about a constitutionally protected right. Accordingly, the decision of the Supreme Court of Virginia should be reversed and the conviction vacated.

Respectfully submitted,

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September, 1974

APPENDIX A

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JEROME COLLER

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Defendants.

AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action seeking to enjoin defendants from enforcing the provisions of Article 43, Section 129 of the Annotated Code of Maryland (1971 Replacement Volume) and Regulation F of the Board of Medical Examiners of Maryland ("Regulation F") insofar as they operate to prevent plaintffs from gathering, receiving and publishing certain factual information about physicians practicing in Prince George's County, Maryland.

2. The value of the amount in controversy exceeds $10,000.

3. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(3).

4. Plaintiff Public citizen is a non-profit public interest organization supported by public donations.

5. Plaintiff Health Research Group is a non-profit public interest organization which is financially supported by plaintiff Public Citizen. It conducts research and issues publications in the area of health care delivery.

6. Plaintiff Maryland Public Interest Research Group ("MaryPIRG") is non-profit public interest organization incorporated in Maryland and supported by students attending Maryland colleges and universities.

7. Plaintiff Prince George's County Health and Welfare Council is a non-profit social service organization, with approximately one hundred and forty members who are residents of Prince George's County, Maryland.

8. Defendant Commission on Medical Discipline of Maryland is charged by Article 43, Section 130(h) of the

Annotated Code of Maryland (1973 Supplement) with regulation of the professional conduct of physicians and is authorized to reprimand, place on probation, suspend, or revoke the license of any physician who violates any statute, rule, or regulation relating to the conduct of a physician, including advertising in violation of Section 129.

9. Defendants Elmer G. Linhardt, John M. Dennis, Charles Bagley, Jerome Collier, John E. Adams, Eli Lippman, Karl F. Mech, William G. Speed III and William Carl Ebeling are the sole members of defendant Commission on Medical Discipline of Maryland. (The individual members of the Commission and the Commission are referred to jointly as the "Commission").

10. Defendant Prince George's County Medical Society is a private, voluntary professional association of physicians practicing in Prince George's County, of which defendant John T. Lynn is president. (The defendant Prince George's County Medical Society and defendant Lynn are referred to jointly as the "County Society"). Defendant Medical and Cirurgical Faculty of the State of Maryland is a private, voluntary professional association of physicians practicing in Maryland, of which defendant William Carl Ebeling is president. (The defendant Medical and Cirurgical Faculty of the State of Maryland and defendant Ebeling are referred to jointly as the "State Faculty"). The County Society and State Faculty are charged by Article 43, Section 130(g) with investigating cases referred to them by the Commission, and defendant State Faculty is also charged by Section 130(g) with initiating investigations and reporting to the Commission cases, *inter alia*, in violation of Section 129.

11. In June 1973, as part of its efforts to assist consumers of medical services, plaintiff Health Research Group began work on a directory that would contain information of interest to consumers relating to all physicians practicing in Prince George's County ("the Directory"). To gather information for the Directory, plaintiff Health Research Group prepared a questionnaire which was to be used to obtain information from each physician regarding, *inter alia*, his office hours, his fees for office visits and certain laboratory tests, whether the physician accepts payment from Medicare and Medicaid, foreign languages spoken, and educational background. (A copy of the questionnaire is attached hereto as Exhibit A). During the week of July 16, 1973, volunteers and employees of plaintiff Health Research Group telephoned the office of each Prince George's County physician and sought to obtain the answers to the questions on Exhibit A from the physician himself or from an assistant. The answers were recorded on the questionnaire, and a copy of the completed questionnaire was mailed to the physician who was asked to verify and, if necessary, correct the information on it.

12. On or about July 19, 1973, defendant County Society sent a notice to each Prince George's County physician warning him that publication of fees and other information in the Directory would constitute advertising in violation of Maryland law.

13. Article 43, Section 129 of the Annotated Code of Maryland provides: "No physician shall advertise except as provided by regulations" of the Maryland State Board of Medical Examiners ("State Board"). Regulation F promulgated by the State Board prohibits all advertising by physicians except the use of personal business cards, change of address notices to bona fide patients, announcements to other physicians of new staff or offices, and small signs outside and on the door of a physician's office.

14. On or about July 31, 1973, defendant County Society sent another memorandum to its members warning that it considered publication of fees and other information in the Directory to be advertising and therefore illegal under Maryland law.

15. On or about August 2, 1973, defendant State Faculty wrote both plaintiff Health Research Group and defendant County Society advising them that its legal counsel had concluded that if a physician permitted the publication in the Directory of any information which he had furnished to the plaintiff Health Research Group, other than his name, specialty, and office hours, he would be advertising in violation of Maryland law.

16. As a result of the above actions of the defendants State Faculty and County Society, many physicians in Prince George's County declined to cooperate with the plaintiff Health Research Group in the publication of the Directory, and others requested that information about them which they or their assistants had previously furnished to plaintiff Health Research Group not be published in the Directory. A further factor in the decision of many of the above physicians not to cooperate or to request that previously furnished information not be included was an awareness on their part that to permit inclusion of information about them in the Directory would subject them to disciplinary proceedings brought by the defendant Commission.

17. On January 17, 1974, plaintiffs Public Citizen and Health Research Group published a partial Directory which together with plaintiff MaryPIRG they are selling to the public at a price which includes only the actual printing cost. Plaintiffs neither have nor will accept or request any consideration from any Prince George's County physician for listing in the Directory.

18. For the reasons set forth in paragraph 15 hereof, the Directory does not contain information on 57% of the Prince George's County physicians. In addition, plaintiff Health Research Group was unable to make contact with another 18% of the Prince George's County physicians, some of whom may also have been unwilling to cooperate with plaintiff Health Research Group for the reasons set forth in paragraph 16 hereof. Consequently, the Directory contains information about only 25% of the Prince George's County physicians.

19. In order to render the Directory more complete and useful to persons who may wish to utilize the services of Prince George's County physicians, plaintiffs Public Citizen, Health Research Group, and MaryPIRG plan to update the Directory and to add information from those physicians who have declined to supply or permit plaintiff Health Research Group to utilize information about their practices because of Section 129, Regulation F, the actions of defendants State Faculty and County Society and the prospect that defendant Commission may seek to discipline them for advertising.

20. Unless enjoined by this Court, the defendants will continue to act or threaten to act in a manner that will preclude plaintiffs from gathering and receiving information from many Prince George's County physicians for publication in a revised Directory. In addition, such actions on the part of defendants will also interfere with the opportunity of persons desiring to utilize the services of physicians practicing in Prince George's County by denying such persons, some of whom are members of plaintiffs MaryPIRG and Prince George's County Health and Welfare Council and supporters of plaintiff Public Citizen, access to information on which to base an informed choice of a physician.

21. The prohibition of advertising imposed by Section 129 and Regulation F and enforced by defendants violates the First Amendment rights:

(a) of plaintiffs to gather and publish factual information concerning physicians practicing in Prince George's County; and

(b) of the members of plaintiffs MaryPIRG and Prince George's County Health and Welfare Council, the supporters of plaintiff Public Citizen, and of other consumers of medical services to receive such information.

22. The actions of defendants described herein in enforcing the prohibition of advertising imposed by Section 129 and Regulation F violate 42 U.S.C. § 1983.

WHEREFORE, plaintiffs pray for an order

(1) convening a three-judge court pursuant to 28 U.S.C. §2284;

(2) declaring that to the extent that Article 43, Section 129 and Regulation F of the Maryland State Board of Medical Examiners prohibit physicians from supplying plaintiffs the answers to the questions contained in Exhibit A for publication in the Directory described herein, they are unconstitutional in violation of the First Amendment;

(3) declaring that to the extent that defendants seek to enforce Article 43, Section 129 and Regulation F to prohibit physicians from supplying plaintiffs the answers to the questions contained in Exhibit A for publication in the Directory described herein, they violate the rights of plaintiffs, under the First Amendment and under 42 U.S.C. §1983;

(4) enjoining defendants, their officers, agents and employees from enforcing the provisions of Article 43, Section 129 and Regulation F insofar as they prohibit any physician from supplying plaintiffs the answers to questions contained in Exhibit A for publication in the Directory;

(5) requiring defendant County Society to send notice to all physicians in Prince George's County informing them that providing plaintiffs with the information sought in Exhibit A for publication in the Directory does not violate any lawful rule, regulation or statute;

(6) granting plaintiffs such other and further relief as may be just and proper including their costs and disbursements in this action.

DATED: Baltimore, Maryland
February 22, 1974

/s/ Raymond T. Bonner
Raymond T. Bonner

/s/ Robert E. McGarrah, Jr.
Robert E. McGarrah, Jr.

/s/ Alan B. Morrison

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EXHIBIT A

PRINCE GEORGE'S COUNTY
DOCTOR QUESTIONNAIRE

Name of Doctor: _____

Name of Interviewer: _____

Contacts: Date _____ Hour _____
_____ _____
_____ _____

Good morning (afternoon, etc.) this is __(your name)__ I am working with the Health Research Group and other Prince George's people to put together a directory of doctors in the County. I'd like to ask you a few questions about Dr. _____.

(If cooperation is refused, tell the person that this is a consumer effort and that their refusal to cooperate will be made public when the directory is published.)

START IMMEDIATELY WITH THE QUESTIONS
(check [/] answers unless otherwise noted)

1. a. Are you a practicing physician? ____Yes ____No
(If "No", terminate questions here).

b. What is your specialty? _____.

2. What type of practice are you engaged in?

____ group practice (a) How many are there in the group? _____
(b) What are their specialties?
_____

____ solo practice

____ other (please specify) _____
_____
_____

3. Do you have any other positions such as teaching, staff appointments or research? ____ Yes ____ No

Specify _____
_____

4. a. From what medical school did you graduate?
_____
In what year? _____

b. What is your education after medical school and internship? (residency, specialty training?)

Type of training	Number of Years

5. Are your Board Certified? ____ Yes ____ No

6. Which hospitals do you primarily use? _____
_____

7. What are the office hours at each of your offices?

Hours	Office Address	Phone Number

8. What is your after hours coverage for:

	None	Answering service	Can be reached at home	Other doctors covering
Weekends:	____	_____	_____	_____
After closing:	____	_____	_____	_____
Vacations:	____	_____	_____	_____

9. How many of the following support personnel do you have in your office?

____ RN (registered nurse) ____ LPN (Licensed practical nurse)
____ medical assistants
____ other (specify) ____ secretaries

_____

10. What is the average waiting time to get a non-emergency appointment? _____ _____Would not answer

11. Will you accept any new patients? ____ Yes ____ No

12. Do you see unscheduled walk-in patients? ___Yes ___No
_____ Only emergencies

13. Do you accept:

	Yes	No	Would Not Answer
Medicare	___	___	___
Medicaid	___	___	___

14. How much time do you allot for each patient, assuming you are not seeing the patient for the first time, or doing a complete physical? _____

15. Can you take care of non-English speaking patients in their own language? ____Yes ____ No
List Languages _____
_____

16. Do you make housecalls? ____Yes ____No

17. How do you inform patients of your fees?
____ available on request
____ patients are informed when they make an appointment
____ patients are informed during the appointment
____ patients are informed when they receive a bill
____ other, specify: _____
_____ would not answer the question

OMITTED FROM PUBLICATION IN THE DIRECTORY

18. Do you require patients to pay your fee at the time of their appointment?

____ Yes ____No ____Would not answer

19. What is your standard fee for:

an initial office visit ____ ____ Would not answer
a routine office visit ____ ____ Would not answer

20. Do you take samples for the following tests in your office?

Test	No	Yes	Price to patient	Would not answer
urinalysis	___	___	_____	___
complete blood count	___	___	_____	___
throat culture	___	___	_____	___
blood sugar (glucose)	___	___	_____	___
Pap smear	___	___	_____	___

21. How much of your practice is:

(a) Self paying? ___None 1/4 ___1/4 1/2 ___ 1/2 3/4
(non Medicaid/Medicare) ___3/4 All
___Would not Answer

OMITTED FROM PUBLICATION IN THE DIRECTORY

(b) Medicaid? ___None 1/4 ___1/4-1/2 ___1/2-3/4
___3/4 All
___Would not Answer

(c) Medicare? ___None 1/4 ___1/4-1/2 ___1/2-3/4
___3/4 All ___Would not Answer

22. Do you prescribe birth control? ___ Yes ___ No

23. Are you currently prescribing

___ Plain Daryon? ___Would not answer
____ Ilosone? ___ Would not answer
____ Ritalin (for hyperactivity)? ___ Would not answer

OMITTED FROM PUBLICATION IN THE DIRECTORY

24. (a) Do you routinely give immunizations?

Adult _____ ____ Yes ____ No

Children _____ ____ Yes ____ No

(b) If yes, specify which immunizations Adults _____

Children _____

25. When a patient makes a complaint about his/her bill or how he or she is being treated, how is it handled?

___ Doctor meets with patients individually

___ Secretary or nurse handles complaints

___ Complaints are referred to medical society

___ Would not answer